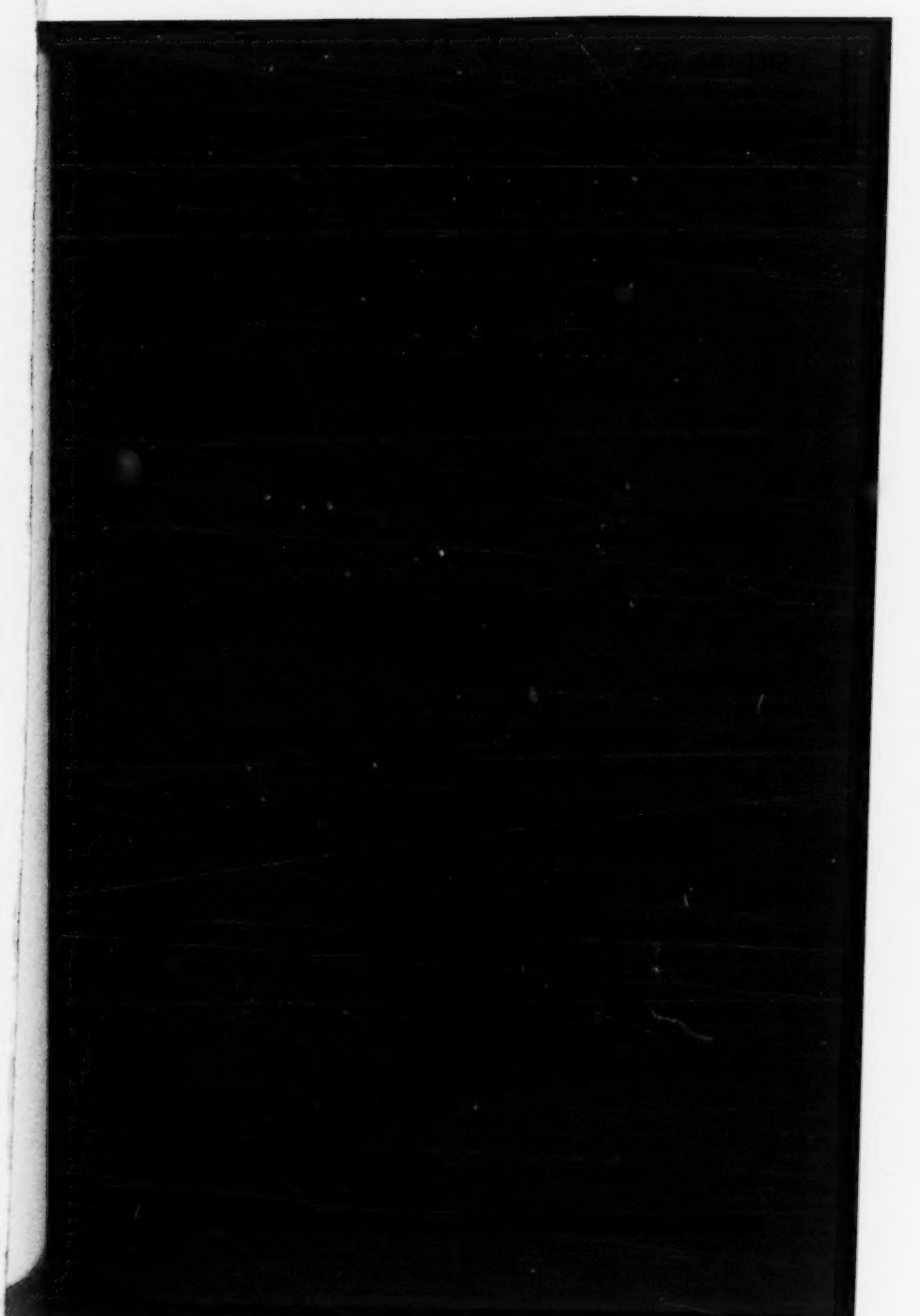

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In The

Supreme Court of the United States

October Term, 1972

No. 72-5411

JOHN R. DILLARD, ETC.,

Appellant,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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MOTION TO DISMISS OR AFFIRM BY AETNA CASUALTY AND SURETY COMPANY

Appellee, Aetna Casualty and Surety Company, moves the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I.

THIS COURT AND THE COURT BELOW LACK JURISDICTION

Jurisdiction is sought under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. That Act was based on the Fourteenth Amendment prohibition that "[n]o state shall * * *" do certain prohibited acts and thus by its terms applied only to actions taken "under color of state law."

The legislative history of the Civil Rights Acts of that period shows that the primary legislative fear was that officials and citizens would use affirmative grants of state power to abuse and harass the free men. Avins, *The Reconstruction Amendments' Debates* (1967); see also, the *Slaughter House* cases, 16 Wall. 36 (1873).

This statute's general prohibitions have been expanded to cover general abuses of authority by law enforcement officials [*Monroe* v. *Pape*, 365 U.S. 167 (1961)]. This later expanded to a protection of classical property rights [*Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969)] and later to what Professor Reich called the "New Property"*—government largess *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). To our knowledge this Court has gone no further.

This case does not involve an affirmative grant of state power to an employer. The so-called "right" of the employer to terminate is analogous to the "right" of an employee to quit his job, the "right" of a person to buy property from another, or, generally the "right" of any person in a free society to do that which is not by law specifically prohibited. We do not have here government largess or the divesting of traditional property rights. Rather, this case involves conflicting claims between private parties over weekly payments.

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* C. Reich, *The New Property*, 74 Yale Law Journal 733 (1964).

The essence of appellant's complaint is that having restricted an employer's freedom by statute, the Commonwealth of Virginia erred unconstitutionally by not restricting the employer further by prohibiting termination without a full hearing. Jurisdiction is thus based on state action by inaction. To accept this proposition would be to rewrite the Fourteenth Amendment into a general proposition: "No state shall *'permit"* certain proscribed activities. Coupled with this mandate would be the threat that if a state did permit such activities, the United States Courts would order the states to do that which they should have done.

To put the matter into prospective, appellant's argument would apply to a state legislative program modifying the common law rule that hirings are presumed to be at will and normally terminable by either party without liability. If a state required "good cause" for termination and established special courts to hear the suits which would inevitably arise, appellant's argument would prohibit the employer in such a state from firing an employee prior to a hearing, even though the states which created the courts and the right did not deem a pre-termination hearing mandatory. As Mr. Justice Black has argued, this due process position, followed to its logical conclusion, will require an appointive counsel at a pre-termination hearing, full appellate review with appointive counsel and a requirement that termination await termination of the appellate proceedings. *Goldberg* v. *Kelly, supra,* at 274 (dissenting opinion).

This Court's analysis in *Lindsey* v. *Normet,* ..... U.S. ....., 31 L.Ed.2d 36, 92 S.Ct. 862 (1972), supports appellee's position herein. The plaintiff in *Lindsey* challenged the constitutionality of Oregon's Forcible Entry and Wrongful Detainer statute ("FED"). Plaintiff alleged that the extremely short time span between service of proc-

ess and hearing, the limitation of defenses in the FED proceeding and the requirement that the tenant pay rent *pendente lite* violated the Due Process clause of the Fourteenth Amendment. In affirming the lower Court's dismissal, this Court recognized that the purpose of the FED statute was to mitigate the harshness of the common law rule allowing a landlord to utilize self help and to evict a tenant for nonpayment of rent. This Court also noted that all defenses could be raised in a subsequent proceeding and damages recovered if justified. Thus, statutory schemes modifying harsh common law procedure should not be examined in a Due Process vacuum, but rather in the context of the common law procedures they replaced.

II.

ABSTENTION

Mr. Justice Frankfurter's theory of abstention has been often criticized, but the published criticisms do not obviate the need in this particular case. First, the primary complaint involving the named plaintiff has been settled. (Appendix II and III). Second, the Virginia Industrial Commission on April 1, 1972 amended the rule under attack to require a hearing on the record prior to termination. (Appendix I). Third, no other class member felt sufficiently deprived to petition the Court below for right to intervene. Cf. *Taylor* v. *Safeway Stores, Inc.*, 333 F.Supp. 83, 87 (D. Colo. 1971) and *Avery* v. *Providence Hospital*, 4 EPD ¶ 7788 (D.C. D.C. 1972). Fourth, as Mr. Chief Justice Burger made clear in his third State of the Judiciary message, this Court is now operating under a staggering case load. Fifth, appellant would have this Court reorder state statutes and private relationships without giving state courts or administrative agencies an opportunity to speak to the need

appellant raises. And, sixth, neither this Court nor the Court below has—or in the immediate future will have—essential factual data concerning the day-to-day experience under new Rule 13.

These considerations establish the need for the exercise of what Professor Bickle calls the "passive virtue" of abstention. A. Bickle, *The Least Dangerous Branch* c. 4 (1962).

Therefore, in view of the questionable jurisdiction of this Court, the fact that the actual procedure does meet the due process requirements as shown by Circuit Judge Bryant's opinion below and the "special need" for abstention, defendant, Aetna Casualty & Surety Company respectfully moves this Court to affirm the case below or dismiss the appeal.

Respectfully submitted,

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